Editor's note: Affirmed on reconsideration -- See 102 IBLA 70 (April 14, 1988); vacated by Under Secy., See memorandum dated Jan. 31, 1989 at 102 IBLA 70A.

UNITED STATES
v.
AIKEN BUILDERS PRODUCTS

IBLA 85-99 Decided December 19, 1986

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring mining claims null and void and rejecting mineral patent application. CA-6490.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

   In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

   In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

APPEARANCES: Wilfrid C. Lemann, Esq., San Bernardino, California; Lawrence A. McHenry, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Aiken Builders Products (ABP) has appealed from a decision of Administrative Law Judge E. Kendall Clarke declaring the Valco Nos. 1 and 2 and the Red Beauty Nos. 1, 2, and 3 mining claims situated in San Bernardino County, California, null and void for lack of a discovery of a valuable mineral deposit prior to July 23, 1955. The decision also rejected appellant's mineral patent application, CA-6490.

The claims were located in 1954 and 1955 for a deposit of volcanic cinders. On February 18, 1982, BLM initiated the present contest by filing a complaint charging that a valuable mineral deposit had not been discovered within the limits of appellant's mining claims and that the "mineral material present cannot be marketed at a profit now and/or could not be marketed at a profit prior to the Act of July 23, 1955." Appellant filed a timely answer and a hearing was held before Judge Clarke in San Bernardino, California, on January 19-21, 1983, and in Las Vegas, Nevada, on February 28, 1983. In his decision, Judge Clarke declared appellant's mining claims null and void because appellant had not overcome the Government's prima facie case that appellant's predecessors-in-interest had not discovered a valuable mineral deposit on each of the claims prior to July 23, 1955, the effective date of section 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982). After noting that the claims were located for volcanic cinders and that deposits of common varieties of that mineral were no longer locatable after passage of the Act of July 23, 1955, Judge Clarke found appellant had not shown this mineral could have been extracted, removed, and marketed at a profit in 1955, thus satisfying the "marketability test" set forth in United States v. Coleman, 390 U.S. 599 (1968).

In the statement of reasons for appeal, appellant contends the test of marketability is not whether a particular mineral deposit was actually being extracted, removed, and marketed at a profit but, rather, whether it could have been extracted, removed, and marketed at a profit. Appellant also challenges the adequacy of the testimony of the Government expert, Joe Rudys, to establish a prima facie case of the invalidity of the mining claims. In addition, appellant asserts the Administrative Law Judge erred in giving undue weight to the testimony of the Government expert and insufficient weight to the testimony of contestee's expert, Hale Tognoni.

The testimony of Rudys, the expert relied upon by the Government to establish a prima facie case of the invalidity of the mining claims, is criticized by appellant as based on hearsay and lacking in personal knowledge of the marketability of the mineral deposit on the claims in 1955. Although such factors are properly considered in the weight afforded such testimony, they do not negate the existence of a prima facie case. Indeed, such shortcomings may be difficult to avoid when it becomes necessary to determine the validity of a mining claim nearly 30 years after the date such deposits were removed by statute from location under the mining laws.

Rudys, a mining engineer who had been employed in that capacity for over 30 years with both private industry and BLM, researched the market for

cinders in the 1950's and found that expanded shale was a "serious and important competitor in southern California" at the time. (Tr. I at 24). 1/ Rudys also testified that the 1955 Minerals Yearbook published by the Bureau of Mines, United States Department of the Interior (Exh. B), showed only "small production" from five California counties including San Bernardino. (Tr. I at 25-26). Rudys also contacted Vera Love, a predecessor in interest of the contestee; Denzel Aiken, a principal of the contestee; and Warren Mecham, mine supervisor for the contestee. Based on his research and the information he obtained from Mecham, Aiken, and Love, Rudys gave his opinion that in 1955 the market for cinders, especially in California, was poor. (Tr. I at 37). He testified that in his "professional opinion * * * the market was bad, it wasn't any good in about '55. It would be difficult for an operator to make expenses in most operations." (Tr. I at 38-39). Hence, Rudys concluded a prudent man would not try to market or to mine this particular material in 1955. (Tr. I at 39). We must affirm the conclusion of the Administrative Law Judge that the Government established a prima facie case of the invalidity of the claims.

The critical issue raised by this appeal is whether appellant has overcome the prima facie case and shown, by a preponderance of the evidence, that the mineral deposit on the claims could have been extracted, removed, and marketed at a profit as of July 23, 1955, when deposits of common varieties of volcanic cinders became no longer locatable. Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared deposits of common varieties 2/ of cinders and certain other materials shall not be deemed a valuable mineral deposit within the meaning of the mining laws. Hence, in order for a mining claim for such a mineral deposit to be validated, the prudent man-marketability test of a discovery of a valuable mineral deposit must have been met at the time of the Act. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); United States v. Martinez, 49 IBLA 360, 366, 87 I.D. 386, 389 (1980).

[1] In order to support a discovery of a valuable mineral deposit, the evidence must disclose a discovery of a deposit such that a man of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894). As the Supreme Court recognized in United States v. Coleman, supra at 602, the purpose of the mining law is to reward and encourage discovery of minerals which are valuable in an economic sense--minerals which no prudent man would extract because there is no demand for

1/ The transcript of testimony taken on Jan. 19-21, 1983, in San Bernardino, California, is referred to as Tr. I, and the transcript of testimony taken on Feb. 28, 1983, in Las Vegas, Nevada, is referred to as Tr. II.

2/ Appellant also suggests it is not required to establish the discovery of a valuable mineral deposit prior to July 23, 1955, because the cinder is not a common variety under section 3 of the Common Varieties Act, 30 U.S.C. § 611 (1982), where it has a "property giving it [a] distinct and special value" (Brief at 9). However, appellant presented no evidence in support of this contention. See Tr. I at 195-97.

them at a price higher than the cost of extraction and transportation are not economically valuable. Hence, the marketability test, i.e., whether the mineral deposit can be mined, removed, and marketed at a profit, has emerged as the logical complement to the prudent man test. Id. at 602.

Sylvia Bell, co-locator of the claims, testified she allowed Roy King to enter the claims in 1955 with a loader and a truck to remove cinders. (Tr. II at 14). Bell also allowed others to remove cinders without charge in order to meet the annual assessment work requirements. (Tr. II at 15-16). Further, she stated that she never made any money from the claims until she sold them to Aiken (Tr. II at 16), although she acknowledged that King sold some cinders from the claims with her permission in late 1954 and 1955. (Tr. II at 26). Bell also testified that there was no screening plant or machinery on the claims in the 1950's. (Tr. II at 22). Jack DelFante, who leased the claims from Bell, said he set up a screening plant on the cinder cone in 1960 which he sold to the Aikens in 1961. (Tr. II at 53). Denzel Aiken testified to acquiring a couple of dump truck loads of cinders from the Bell claims in 1954. (Tr. I at 340). His affidavit states that appellant has been purchasing cinders from the mining claims since approximately 1958 or 1959. (Exh. F-1).

Although appellant had figures for recorded production from the claims from 1966 to 1982 (Tr. I at 166), records of earlier production from the pits were destroyed. Mineral Economics Corporation, a firm owned by appellant's expert, Tognoni, compared the volume of the cinder cone in 1953 as measured from a topographic map with the volume of the cone in 1982 as measured from plotting the topographic contours of the cone at that time. (Tr. I at 161-165). Comparing the volume at the two dates to arrive at an estimate of production for the intervening period, actual production for the years 1966 to 1982 was subtracted out to arrive at an estimated production for the years 1954 to 1965 (Tr. I at 166-67). However, Tognoni was unable to explain the basis for allocating production to the years 1954 and 1955 other than by "drawing a curve." (Tr. I at 167, 218-20). Thus, we find no error in the Administrative Law Judge's conclusion that the testimony of Tognoni as to production prior to July 23, 1955, was speculative and not persuasive in light of the testimony of Bell and DelFante. 3/ Based on the record, it is clear that although some isolated sales of cinders were made prior to July 23, 1955, no income was realized by the claim holders and no commercially viable marketing of cinders from the claims had been accomplished.

3/ It is true that appellant presented certain hypothetical evidence attempting to establish both actual sales and potential sales during the critical period. Judge Clarke characterized the Tognoni market survey, when analyzed in light of the testimony of various witnesses, as "full of inconsistencies and contradictions." (Dec. at 8). With respect to the costs of extraction and marketing, Judge Clarke noted that the inquiries by the Government "met with obfuscating and evasive responses." (Dec. at 11). It is clear that Judge Clarke, who as the trier-of-fact had an opportunity to observe the demeanor of appellant's witnesses as they testified, found them noncredible on questions critical to the resolution of this appeal. As we noted in

[2] With respect to a location for a common variety mineral made prior to July 23, 1955, where there is little or no evidence of pre-1955 sales, the costs of extraction, preparation, and transportation, as well as the level of the then-existent market, should be considered. Rawls v. United States, 566 F.2d 1373, 1376 (9th Cir. 1978); United States v. Gibbs, 13 IBLA 382, 391 (1973).

Appellant contends it overcame the Government's prima facie case by a preponderance of the evidence. Appellant argues there was a market for the cinders from its claims prior to July 23, 1955, with the two principal buyers being Cind-R-Lite, which had originally supplied ABP, and ABP, and that a certain amount of purchases were made from appellant's claims at that time. Appellant states that there was a "booming outlet for [the] profitable disposal of a substantial quantity of cinders prior to July 23, 1955, in the Las Vegas market." (Brief at 9). The production of cinder in the "Cima area" of California and sales to buyers in Las Vegas had been overlooked by the Government mineral examiner, and, based on appellant's evidence, Judge Clarke concluded that "[o]n July 23, 1955, there was, ostensibly, a market for cinders." (Decision at 11). We agree. Indeed, there was testimony by Russell Aiken that ABP alone was using 80,000 pounds of cinder per day in its manufacturing operations between 1955 and 1957. (Tr. I at 428). Moreover, a substantial market had been in existence since at least 1947. (Tr. I at 74, 329-31; see also Tr. I at 105-08, 119-20). The existence of a market is not negated by the fact that ABP was at such times purchasing, for the most part, from Emerson Ray's "Cima pit" operations (Tr. I at 339; Exh. 4 at 26), in the absence of evidence that the market was closed to competition. United States v. Gibbs, supra at 392-93. However, as Judge Clarke further stated, "the bare existence of a market is not sufficient to satisfy the marketability test" (Decision at 11).

The major shortcoming in appellant's case is the failure to establish by a preponderance of the evidence that the cinder on appellant's claims could have been extracted, removed, and marketed at a profit prior to July 23, 1955, given the capital investment required to commence production in quantity. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983). As the Administrative Law Judge found, appellant presented no evidence of the cost of extracting and processing the cinders so they could be marketed successfully as of July 23, 1955. (Decision at 11).

Indeed, Tognoni, appellant's expert witness, qualified his conclusion that the cinders from appellant's claims could have been marketed at a profit

---

fn. 3 (continued)
United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973), the Department traditionally affords considerable weight to the findings of the trier-of-fact and where resolution of a case depends primarily upon his findings of credibility, his findings will not be lightly set aside. Id. at 212, 80 I.D. at 417-18. No justification appears of record for ignoring Judge Clarke's clear findings that the testimony for appellant as to marketability was simply not believable.

in the Las Vegas market on the condition the claimant would have had to put in "the size roads he needed and the size screening operation he needed to get to that market." (Tr. I at 303; see also Tr. I at 307). Tognoni acknowledged that appellant's predecessors in interest could not have made a profit with the facilities they had in place on July 23, 1955. (Tr. I at 307). Russ Aiken testified that an estimated $ 300,000 was invested by ABP in capital improvements since 1961 when they took over the operation and that the "capital improvements always reduced the cost per ton of cinders." (Tr. I at 432). Denzel Aiken testified that although he liked the quality of the cinders he had obtained from the Bell claims in 1954, he was concerned about whether Bell could supply him with the quantity of cinders he needed at his manufacturing plant. (Tr. I at 341). He explained that Bell hadn't "fully mechanized his operation to take care of us" in terms of providing both sufficient quantity and adequate screening of the cinders for size. (Tr. I at 341-342). Thus, it is clear that substantial capital investment in the claims in terms of road improvement and screening/sorting equipment was necessary to mine, process, and market cinders in the quantity required to establish a profitable operation.

The evidence fails to establish that the market for cinders in 1955 was sufficient to justify the capital investment required to market the cinders. The record shows Denzel Aiken was approached by the Bells prior to 1955 with an offer to sell the mine to him. (Tr. I at 358; Exh. F-1). However, despite the fact Aiken had the need for cinders for his own cinderblock manufacturing operation, he turned them down because at the time he "didn't think [he] should get into the mining business." (Tr. I at 358). Although Bell, owner of the claims in 1954 and 1955, talked of trying to get a loan from a bank to develop a full-time mining operation (Tr. II at 36), she had to give cinders away in order to get assessment work performed. (Tr. II at 16, 19). Accordingly, we must affirm the decision of the Administrative Law Judge that appellant has failed to show discovery of a mineral deposit which could be mined, removed, and marketed at a profit as of July 23, 1955.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge